Thiang Kai Goh v Yee Bee Eng & Ors

HIGH COURT (SHAH ALAM) — CIVIL SUIT NO MT1–22–15 OF 1998
SURIYADI J
27 SEPTEMBER 2004

Succession — Will — Validity — Burden of proof — Whether upon propounder of will to prove testamentary capacity and due execution — Whether burden on propounder of will to dispel suspicious circumstances surrounding making of second will — Whether burden discharged

The testator, Thiang Thong Long ('TTL') had two sons, ie the plaintiff and one Tia Khye Thye (now deceased) ('TKT) and a daughter named Thiang Yoke Choo (TYC). The second, third, fourth and fifth defendants were born to TKT and one Yee Bee Eng (the first defendant). By a will dated 31 May 1994 (the 'first will') TTL appointed the plaintiff as the executor and trustee. In that will he had bequeathed the property held under CT 2941, Lot 12, Section 15, Town of Klang together with a double storey shophouse erected on it known as No 49, Jalan Tengku Kelana ('the impugned property') to the plaintiff – 4/10th share; the first defendant – 3/10th share; and, the second, fifth and fifth defendant – 1/10th share. On 19 January 1995, ie about six months after executing the first will, TTL passed away. Prior to his death TTL was residing in the said impugned property with the first, third and fourth defendants. He was not in good health and was bed-ridden. The plaintiff testified that TTL had executed a second will on 18 November 1994, when the plaintiff was in China. The plaintiff only knew of this second will a few days after the death of TTL when they wanted to read the first will. By this second will, TTL appointed the third defendant as the executor and trustee of the bequeathed the impugned property to the second defendant – 1/10th share; third to fifth defendant – 2/10th share; and the first defendant – 3/10th share. The plaintiff was left out of this will. After claiming various declarations, the plaintiff finally sought a declaration that the second will was invalid on the grounds that: (i) the testator had no testamentary capacity as he had affixed his thumbprint to the said will without knowing its true contents and effect; and (ii) the testator had died intestate as regards his coffee shop business, which had been taken over by the first and third defendants.

Held, dismissing the plaintiff's claim with costs:

(1) The legal burden of proof lies upon the party who wishes to propound a will, to prove that the testator had testamentary capacity at the time of making the will. However the evidential burden of proof may shift from party to party in the course of the trial. Notwithstanding the fact that the burden had shifted to the defendants the moment the will was challenged, it was incumbent upon the plaintiff at the end of the whole case to prove, on a balance of probabilities, that TTL had no testamentary

capacity, when he affixed his thumbprint to the second will (see paras 9 and 12).

(2) The solicitor who prepared the will and a close friend of TTL (DW1 and DW2 respectively) had witnessed the affixing of the thumb print by TTL and this remained unchallenged. The agreed medical report on TTL merely stated that he had a history of unsteady gait resulting from a forehead injury one month prior to the medical examination, in absence of any significant abnormality. Besides, the third defendant had obtained the grant of probate and the validity of that probate order would last until set aside in this case. The death certificate also showed cause of death as 'old age' (see paras 18 and 19).

[**Bahasa Malaysia summary**

Pewasiat Thiang Thong Long ('TTL') mempunyai dua anak lelaki, plaintif dan Tia Khye Thye ('yang telah meninggal dunia') ('TKT') dan seorang anak perempuan bernama Thiang Yoke Choo ('TYC'). Defendan kedua, ketiga, ke-empat dan ke-lima adalah anak kepada TKT dan Yee Bee Eng ('defendan pertama'). Melalui satu wasiat bertarikh 31 Mei 1994 ('wasiat pertama'), TTL telah melantik plaintif sebagai wasi dan pemegang amanah. Di dalam wasiat tersebut, dia telah mewariskan suatu hartanah yang dipegang olehnya di bawah CT 2941, Lot 12, Seksyen 15, Mukim Klang, bersama-sama sebuah rumah kedai dua tingkat yang dibina di atasnya yang dikenali sebagai No 49, Jalan Tengku Kelana ('hartanah yang dipertikaikan') kepada plaintif – 4/10 bahagian; defendan pertama – 3/10 bahagian; dan, defendan kedua, ke-empat dan kelima – 1/10 bahagian. Enam bulan selepas menyempurnakan wasiat pertama, TTL meninggal dunia. Sebelum kematiannya,, TTL menetap di hartanah yang dipertikaikan bersama-sama defendan pertama, ketiga dan ke-empat. Dia tidak sihat dan terlantar di katilnya sepanjang masa. Plaintif memajukan bahawa TTL menyempurnakan wasiat kedua pada 18 November 1994 bila plaintif berada di negara China. Plaintif hanya mengetahui akan kewujudan wasiat kedua ini beberapa hari selepas TTL meninggal dunia bila mereka hendak membaca wasiat pertama. Melalui wasiat kedua, TTL telah melantik defendan ketiga sebagai wasi dan pemegang amanah hartanah yang dipertikaikan yang diwasiatkan kepada defendan kedua – 1/10 bahagian; defendan ketiga sehingga kelima – 2/10 bahagian; dan defendan pertama – 3/10 bahagian. Plaintif telah dikeluarkan daripada wasiat tersebut. Selepas memajukan pelbagai tuntutan, plaintif akhirnya memohon suatu deklarasi bahawa wasiat kedua tersebut tidak sah atas alasan: (i) pewasiat tidak mempunyai keupayaan perwasiatan kerana dia telah meletakkan cap jarinya di atas wasiat tersebut tanpa mengetahui kandungan sebenar dan kesannya; dan (ii) pewasiat telah meninggal dunia tak berwasiat berkenaan perniagaan kedai kopinya, yang telah diambil alih oleh defendan pertama dan ketiga.

Diputuskan, menolak tuntutan plaintif dengan kos:

(1) Beban membukti undang-undang terletak pada pihak yang hendak memajukan wasiat berkenaan, untuk membuktikan bahawa pewasiat mempunyai keupayaan perwasiatan pada masa wasiat itu dibuat. Akan tetapi beban membukti keterangan boleh berpindah dari satu pihak kesatu pihak yang lain semasa perbicaraan dijalankan. Walaupun fakta bahawa beban telah beralih kepada pihak defendan pada ketika wasiat itu dipertikaikan, adalah perlu untuk plaintif pada pengakhiran kes untuk membuktikan, atas imbangan kebarangkalian, bahawa TTL tidak mempunyai keupayaan perwasiatan, bila dia meletakkan cap jarinya pada wasiat kedua (lihat perenggan 9 dan 12).

(2) Peguam cara yang telah menyediakan wasiat tersebut dan sahabat rapat TTL (DW1 dan DW2 masing-masing) telah menyaksikan perletakkan cap jari oleh TTL dan ini tidak dipertikaikan. Laporan perubatan yang dipersetujui ke atas TTL hanya menyatakan bahawa dia mempunyai sejarah "gait" yang disebabkan oleh cedera pada kepada dahinya sebulan sebelum pemeriksaan perubatan, dalam ketiadaan apa-apa yang luar biasa. Tambahan pula, defendan ketiga telah mendapatkan geran probet dan kesahan perintah probet tersebut akan wujud sehingga diketepikan dalam kes ini. Sijil kematian juga menunjukkan bahawa sebab kematiannya adalah kerana sakit tua (lihat perenggan 18 dan 19).

Notes

For cases on execution of wills see 11 *Mallal's Digest* (4th Ed, 2002 Reissue), paras 2503–2509

Cases referred to

Barton Singh v Amirchand (1948) AC 161 (refd)
Chua Kooi Haan [2001] 5 MLJ 578 (refd)
Cleare and Forster v Cleare (1869) 1 P & D 655 (refd)
Gan Yook Chin v Lee Ing Chin @ Lee Teck Seng [2001] 2 MLJ 70 (refd)
Khaw Cheng Bok v Khaw Cheng Poon [1998] 3 MLJ 457 (refd)
Krishnan a/p Muniandy v Sethambal d/o Doraiappah [1998] 7 MLJ 366 (refd)
Porker v Felgate (1883) 8 PD 171 (refd)
Tho Yow Pew & Anor v Chua Kooi Hean [2001] 5 MLJ 578 (refd)
Tho Yow Pew & Anor v Chua Kooi Hean [2002] 4 MLJ 97 (refd)
SMKR Meyappa Chetty v SN Supramaniam Chetty (1916) AC 603 (refd)
Udham Singh v Indar Kaur [1971] 2 MLJ 263 (refd)

Legislation referred to

Age of Majority Act 1971, s 2
Evidence Act 1950 ss 101, 102, 114(e)
Inheritance (Family Provision) Act 1971 s 2
Wills Act 1959 s 3

CT Lim (Fernandez & Co) for the plaintiff
RV Lingam (RV Lingam & Co) for the first, second and third defendants
Bernand Chong (LM Liew & Assoc) for the fourth and fifth defendants

Suriyadi J:

[1] The plaintiff, one Thiang Kai Goh is one of the two natural sons of the late Thiang Thong Long, who passed away on 19 January 1995 at the ripe old age of 88 (hereinafter referred to as 'the testator'). At the time of his demise the latter had left behind him the said plaintiff, a daughter called Thiang Yoke Choo, another son named Tia Khye Thye (now deceased), the four defendants who were his grandsons (children of Tia Khye Thye and Yee Bee Eng), and a grand daughter.

[2] By a will and testament dated 31 May 1994 (hereinafter referred to as 'the first will'), the testator had duly appointed the plaintiff, as the executor and trustee of his will. Pursuant to that will he had bequeathed the property held under CT 2941, Lot 12, Section 15, Town of Klang together with a double storey shop house erected on it, known as No 49 Jalan Tengku Kelana (hereinafter referred to as 'the impugned property'), to the below mentioned persons their respective shares in the following manner:

(a) Thiang Kai Goh (plaintiff) accorded four tenth share;

(b) Yee Bee Eng (F) (wife of the late Tia Khye Thye) three tenth share;

(c) Tia Seng Lay (second defendant) one tenth share;

(d) Tia Seng Ghee (fourth defendant) one tenth share; and

(e) Tia Seng Chong (fifth defendant) one tenth share.

[3] As said above, on 19 January 1995 ie about six months after executing that first will, the testator had passed away. It was not disputed that prior to his death the testator was residing at the impugned property with the first, third and fourth defendants, and was not in the best of health causing him to be completely bed ridden. According to the testimony of the plaintiff, some six months after executing that first will, when he was in China ie on 18November 1994 the testator, unknown to the plaintiff, had executed another will (hereinafter referred to as 'the second will'). The plaintiff knew of this second will only a few days after the death of the testator, when he wanted to read the first will, thinking that that document was the only one around. At that fateful date, the plaintiff alleged that the wife of his deceased brother had arrogantly said that a second will existed, which was in possession of a lawyer hence making the first one obsolete.

[4] The facts adduced revealed that the second will had appointed the third defendant as the executor and trustee in place of the plaintiff, bequeathing the

impugned property to the below mentioned persons in the respective shares and leaving none to the plaintiff:

(a) Tia Seng Tay (second defendant) accorded one tenth of a share;

(b) Tia Seng Lay (third defendant) two tenth share;

(c) Tia Seng Ghee (fourth defendant) two tenth share;

(d) Tia Seng Chong (fifth defendant) two tenth share; and

(e) Yee Bee Eng (f) (wife of the plaintiff's late brother) three tenth share.

[5] In the course of the hearing, it was quite obvious to the court that he was absolutely shattered by this piece of information, testifying amongst others, that this current action not only was to retrieve the lost property but also the right of that executorship. Even though he denied having been disowned by his late father, a successful action would redeem and re-establish himself in the eyes of his family and community. It thus was not merely a case confined to dollars and cents but towards something more intangible in nature and meaningful to his pride and mental well-being.

[6] Before discussing the pleadings and the issue at hand, permit me to skim over slightly on the legal scene after the demise of a person, so as to appreciate the matter at hand better. If that deceased person were to leave a will he dies testate whilst if he does not he dies intestate. With his death his legal persona naturally ceases. In intestacies, unless someone comes along and obtain letters of administration to act on the deceased person's behalf, all his affairs will come to a standstill. In cases of testacy where an executor has been lawfully appointed, whereupon he steps into the shoes of the testator, as the assets of the latter has been vested on him the affairs of the latter are managed as if the testator were alive. To ensure the validation of his actions that executor must obtain probate first. In other words probate formalizes and legalizes the authority of the executor to carry on the affairs of the deceased (*Probate and Administration in Singapore and Malaysia: Law and Practice* by G Raman; *SMKR Meyappa Chetty v SN Supramaniam Chetty* (1916) AC 603).

THE MATTER BEFORE THE COURT

[7] Initially the plaintiff's action were in the following format:

(1) a declaration sought that the second will and testament was tainted by undue influence, and thus was null and void and of no legal effect;

(2) in the alternative, a declaration was sought whereby the plaintiff claimed that the said second will was not that of the testator's;

(3) a declaration that the first will represented the true and last will of the testator;

(4) a declaration that the grant of probate of the second will be set aside; and

(5) alternatively in the event of failure to obtain any of the above prayers, for the court to declare that the late Thiang Thong Long (father of the plaintiff) had died intestate.

[8] In the course of the hearing the plaintiff dropped some of his demands and instead sought a declaration that the second will was invalid on the grounds that:

(1) the testator had no testamentary capacity as he had affixed his thumbprint to the said will without knowing its true contents and effect; and

(2) the testator had died intestate as regards his coffee shop business known as 'Chop Yat Ming Khoo', now taken over by the first and third defendants.

[9] It is trite law that the onus of proof lies upon the person or applicant who wishes to propound a will, and in the process produce that document before the proper authority en route to establishing its legality *(Udham Singh v Indar Kaur* [1971] 2 MLJ 263*)*. That person or applicant must satisfy the conscience of the court that the instrument so propounded is the last will of a free and capable testator (see *Cleare and Forster v Cleare* (1869) 1 P & D 655). As the proceeding moves on, the evidential burden may shift from one party to the other. Theobald in *'Wills'* at p 31 had occasion to author:

> The legal (or persuasive) burden of proof always lies upon the person propounding a will to prove that the testator had testamentary capacity at the relevant time. The evidential burden of proof may shift from one party to one party in the course of the case.

[10] In the course of the hearing, the plaintiff en route towards that challenge had inter *alia* stated that the testator was not able to appreciate his last act, there was a probability of the testator not appreciating the exercise of the making of the second will as it was twice translated, and the will being flawed by the presence of one of the defendants at one stage or other prior to the execution of the will.

[11] Despite the burden of proof being on the shoulders of the defendants to establish the validity of the will, at the end of the trial the plaintiff cannot escape the requirements of s 101 and 102 of the Evidence Act. They read:

> 101 Burden of proof
>
> (a) Whoever so desires any court to give judgment as to any legal right or liability, dependant on the existence of facts which he asserts, must prove that those facts exist.
>
> (b) When a person is bound to prove the existence of any fact, it is said that the burden lies on that person.

A 102 On whom the burden of proof lies

The burden of proof in a suit or proceeding lies on that person who would fail if no evidence at all were given on either side.

[12] Regardless of the fact that the burden has shifted to the defendants the moment the will was challenged it is still incumbent on the plaintiff at the end of the whole case to prove his case on a balance of probability. At the end of it all, the plaintiff to succeed must prove that the testator had no testamentary capacity when he affixed his thumbprint to the said will. If successful the effect naturally would be that he had died intestate as regards the coffee shop business known as 'Chop Yat Ming Khoo'.

[13] To arrive at the finding whether the defendants had succeeded in proving the validity of the second will, and deny the challenge of the plaintiff, I now would like to discuss some of the evidence especially the documents adduced by both parties, in particular the agreed documents (B) produced in the course of the hearing. The first document was the first will which, short of all the messy amendments found scribbled all over the document, established beyond doubt that the plaintiff had been appointed the executor and trustee initially, and bequeathed four tenth share of the impugned property. Parties had agreed that the amended document (the first will), had been obtained from the very solicitor who had adverted to it as a model to produce the second will.

[14] The second document in bundle B was the impugned second will and testament (to be discussed in detail later). It was crystal clear that Tia Seng Lay ie the third defendant had been appointed the executor and trustee, in substitution of the plaintiff, and the name of the latter as a beneficiary not reflected in it. The solicitor who prepared the will, together with one Knee Eng @ Hong Kim Poh, a close friend of the testator (DW2 and DW1 respectively) had witnessed the affixing of the thumbprint by the testator on the impugned document. In fact DW1 had also affirmed an affidavit stating that fact, a course of action that did not in any way contravene any provisions of the Evidence Act. G Raman in clear terms had occasion to author at p 20 of '*Probate and Administration in Singapore and Malaysia: Law and Practice'* the following:

Proof of a will is often adduced by one of the witnesses who attested the testator's signature. The proof takes the form of an affidavit sworn by the witness stating that he was present at the time of the execution of the will by the testator and that he would testify to the sanity of the testator and that the testator had executed the will voluntarily knowing full well of its contents.

[15] The third document was a grant of probate, which carried the solitary name of the third defendant. The senior assistant registrar issued this document on 20 July 1997 with the impugned property valued at RM350,000 denoted under the 'asset and liability' column. The route towards propounding that will before me, would inevitably be connected to matters in the like of

this earlier application to obtain a grant of probate, whereupon regardless of the non-existence of any opposition, the applicant must establish the legality of the relevant document first (see *Tho Yow Pew & Anor v Chua Kooi Hean* [2001] 5 MLJ 578). Needless to say the third defendant was successful in establishing the legality of that second will, as otherwise he would not have obtained the grant of probate. The validity of that probate order will last until set aside by this current case in the event the plaintiff were to succeed at the end of the day.

[16] Despite the successful sojourn earlier before the senior assistant registrar, and despite the provision of s 114(e) of the Evidence Act 1950, which permits me to presume that the senior assistant registrar had performed his judicial and official work regularly, but as the plaintiff had mounted a fresh challenge again, the defendants thus must re-establish the validity of that will. This is mandatory despite the grant of probate's regularity, and despite the accepted view that if a duly executed will is rational on the face of it, a presumption arises that the testator had testamentary capacity (*Theobald* at p 32). As far as I was concerned, as the plaintiff had made the challenge, what with some 'suspicious circumstances' evidence adduced along the way, that latter presumption had been rebutted. Thereafter the evidential burden of proof had shifted to the defendants and for them to re-establish the will's validity.

[17] Having perused this document ie the probate it was my finding that there was nothing suspicious or improper about it, that could vitiate the order. In fact there was no evidence before the court to establish that there was any impropriety on the part of the senior assistant registrar who issued the order, or the procedure adopted in the course of applying for the probate was irregular or defective, or for that matter anything or act that could invalidate the order. As a passing remark it is inevitable that in the event the defendants fail to establish the validity of the will again, the probate too would fall.

[18] An agreed medical report signed by one Dr Joseph Ong Ah Soon, tendered by both parties and included in bundle B, recorded that he last saw the testator on 10 October 1994. The latter was recorded to have a history of unsteady gait, resulting from an injury after having fallen on his forehead, one month prior to the above mentioned date of consultation. The eventual clinical evaluation was that no significant abnormality was detected and had not seen him again thereafter for any medical reason. To stretch the issue of this medical report, it merely stated that the testator had an unsteady gait, which was a result of a fall, and with nothing recorded about his lack of testamentary capacity or that he was, say, absolutely insane. Had the medical report recorded that his mental capacity had been seriously and adversely affected by reason of that fall, or had suffered mental imbalance, I would not have hesitated to rule against his testamentary capacity at this stage. Gopal Sri Ram JCA in *ThoYow Pew & Anor v Chua Kooi Hean* [2002] 4 MLJ 97 had occasion to opine:

Now, the law upon the subject of a testator's testamentary capacity, we find to be well settled. The decided cases show quite clearly that very slight testamentary capacity is required for the making of a will. The cases which wills have been held invalid for lack of testamentary capacity involve testators who were utterly insane either upon the finding of the probate court or by reason of an order appointing a committee on the ground of the insanity of the testator. What the law requires to vitiate testamentary capacity is an insane delusion existing at the time of making the will. This will include insanity at the time of the making or giving instructions for the making of the will.

[19] One month and eight days later (18 November 1994) the second will was executed, followed by his death on 19 January 1995 (two months after that document's execution or three months and eights days after the medical consultation). Mundanely, the cause of death, as reflected in the *Perakuan Kematian* document of the 88-year old testator was recorded as "*sakit tua*" (old age) and not of some questionable or unusual disease. In a gist the cause of death in crystal line terms had no serious negative bearing on the making of the impugned will or could have assisted the plaintiff case in any way.

[20] Bearing in mind that the impugned will was under scrutiny, it was therefore encumbent upon me to zero in and scrutinize it meticulously before arriving at some finding. In the course of that scrutiny I started off with the following observations, amongst them:

(i) Whether the impugned property was his ie the testator's to give away at the time of preparing the second will, as required by s 3 of the Wills Act 1959 (Act 346). This requirement is highly relevant as a testator may only dispose by will all property which he owns or to which he is entitled at law or in equity at the time of his death, notwithstanding that he may become entitled subsequent to the execution of the last will. Certainly no man can dispose any property that is not his to dispose. The irresistible answer to the above question here was in the positive.

(ii) The testator certainly had the legal capacity to make the will as he was above 18 years of age (Age of Majority Act 1971 (Act 21) s 2).

(iii) As it was in writing the first requirement of the mode of execution of a will had been complied with.

(iv) The will was in the form and manner required by law, inter alia, in that the testator had left his thumbprint in substitution of a signature at every page of the will, that there were sufficient number of witnesses present to witness the execution of the second will, and the third defendant was not one of the witnesses (him being the executor and thus incompetent to be admitted as a witness, let alone being one of the beneficiaries).

(v) There was no evidence adduced by any party to establish the fact that the impugned will had been revoked before the death of the testator. In other words it was the last will and testament.

(vi) The words used by the testator in making the gift was easily ascertainable, the donee apart from being ascertainable could take the benefit of what was bequeathed and the gift intended was capable of being effected in a manner consistent with the law; and

(vii) no issue of the failure to make reasonable provision for the maintenance of a surviving spouse, a daughter who has not been married or who is, by reason of some mental or physical disability incapable of maintaining herself, an infant son who is, by reason of some mental or physical disability, incapable of maintaining himself had arisen in the course of the hearing (see Inheritance (Family Provision) Act 1971 s 2).

[21] With the documents adduced by both of the contending parties being neutral, and the impugned will on the face of it appeared valid and in accordance with the requirements of the law, I thenceforth had moved forward to the next stage. This was the important stage where I had to sift through the oral evidence of all the witnesses. As it is for the defendants to establish the validity of the second will I will discuss first the oral evidence of the defendants' witnesses namely DW1 and DW2..

[22] These two witnesses had testified that the testator was mentally alert, and was never at any time influenced or coerced in any way to execute the second will. For better appreciation of DWl's evidence, I reproduce verbatim some of his relevant testimony:

S8: Adakah kamu hadir ketika wasiat itu di tandatangani pada 18 November 1994 oleh si mati?

J8: Ya, saya hadir ketika simati menandatangani wasiat itu di hadapan En Seah. EnSeah menyuruh saya bertutur dalam bahasa Hock Chew untuk menerangkan kandungan wasiat itu kepada si mati. Thiang Thong Long memahami kandungan wasiat itu seperti mana yang telah dia arahkan peguam tersebut. Si mati kemudiannya menurunkan cap jarinya secara sukarela selepas Encik Seah menanya kerelaannya untuk menandatangani wasiat tersebut. Kemudian Encik Seah menyuruh saya menandatangani wasiat tersebut sebagai saksi kepada tandatangan si mati di mana saya dengan sukarelanya melakukan.

S9: Adakah kamu pada masa yang material mempengaruhi (undue influence issue withdrawn) si mati menyediakan wasiat?

J9: Saya tidak pernah mempengaruhi si mati dan simati sememangnya sedar akan pembahagian hartanya dan ketika itu Thiang Thong Long (testator) boleh bercakap dan dalam keadaan yang sihat.

S10: Adakah kamu tengok atau dengar ahli keluarga si mati bercakap dengan simati ketika waktu menandatangani wasiat tersebut?

J10: Tidak. Tidak ada seorang ahli keluarganya hadir ketika peguam menyuruh simati menandatangani wasiat di rumah kedainya. Ahli keluarganya yang lain berada jauh dari tempat tersebut.

S11 : Adakah kamu tahu kandungan wasiat tersebut?

J11 : Ya, saya mengetahui kandungan wasiat itu ketika saya disuruh oleh peguam En Sean untuk dibaca kepada simati. Saya yang menterjemahkan isi kandungan wasiat itu kepada si mati

[23] As DW1 and DW2 were about the only ones who were present with the testator at that fateful date, and the only ones who could present a reasonably fair picture of what had happened on that day, their observations were highly pertinent. As there was no medical evidence adduced by the plaintiff of the testator's mental faculties on that particular date, I thus was left only with their testimonies. Mere oral allegations on the part of the plaintiff without more certainly did not convince me of the debilitating testamentary capacity of the testator. Strengthened by the opinion of Gopal Sri Ram JCA in *Tho Yow Pew & Anor v Chua Kooi Hean* [2002] 4 MLJ 97, that it needed only a very slight testamentary capacity to make a good will, what with the plaintiff incapable of adducing any medical evidence to destroy the testator's testamentary capacity *vis-a-vis* the testimony of DW1 and DW2 denying the plaintiffs allegation, the challenge thus was a non-starter. Therefore, regretfully for the plaintiff, with the defendants' witnesses veracity unchallenged and demeanour intact (and all the other adduced documents being neutral), I had no problem in concluding that the testator was of sound mind, capable of understanding his action, in this case affixing his thumbprint to the said will, and or appreciating the disposition of the impugned property to the beneficiaries in the will on the relevant day (*Gan Yook Chin v Lee Ing Chin @ Lee Teck Seng* [2001] 2 MLJ 70; *Khaw Cheng Bok v Khaw Cheng Poon* [1998] 3 MLJ 457; *Krishnan a/p Muniandy v Sethambal d/o Doraiappah* [1998] 7 MLJ 366; *Thow Yow Pew v Chua Kooi Hean* [2001] 5 MLJ 578). In simple words, the defendants had successfully rebutted the challenge of the plaintiff.

[24] To appreciate the position of the plaintiff, and to gauge whether there was any evidence that could support his allegations or rebut the defendants success in establishing the will, I now reproduce verbatim some of his most useful oral testimony:

'Q: Did your father tell you or discuss with you about the second will dated 18November 1994?

A: No. He has no memory or recollection of the second will and every time he talked to me it was about his first will dated 31 May 1994.

Q: When did you become aware that your late father had made a second will?

A: Immediately after the funeral ceremony Yee Bee Eng very boastfully declared to me that she had changed my father's will, and that I have no more share in my father's property I was shocked and demanded to see the new will.

Q: Did you go abroad between 14–18 November 1994?

A: Yes, I had to go to Beijing, China on business.

Q: When you visited your late father on your return on 18.November 1994 did your father mention he had just executed a will?

A: No.

Q: Do you know of any reason why your father wanted to cut you off from his will?

A: I do not know of any reason I have loved him and he loved me dearly as his only surviving son.

Q: Do you have any reason to believe why your father's second will dated 18Novermber 1994 does not represent his true will?

A: Yes, my reasons are as follows:

(i) My late father was very ill and very weak at that time. He was definitely unable to instruct a solicitor to prepare the second will;

(ii) My late father would never revoke the first will and execute the second will without my knowledge and without fully understanding the nature and consequence of executing the second will;

(iii) The first defendant jointly with the third, fourth and fifth defendants jointly and severally with full knowledge that my late father was at the material time very weak and mentally unstable exerted undue influence and acquired dominion over my late father in respect of the instructions and execution of the second will;

(iv) The first defendant jointly with the third, fourth and fifth defendants jointly and severally chose to exert the undue influence and dominion with full knowledge that I had gone overseas (China) and that my late father was totally immobile and confined to bed and requiring the assistance of the first defendant for his food, comfort and every need;

(v) The first defendant jointly with the third, fourth and fifth defendants had particularly enlisted the help of one Mr Khee Eng @ Hong Kim Poh to be one of the witnesses to the will who is their close friend and who was also closely known to my late father to cooperate with them in the exercise of the undue influence over my late father with full knowledge that Mr Khee's presence will provide comfort and encouragement to my late father in affixing his thumb print in execution of the second will which was done without any independent advice;

(vi) In the circumstances my late father had affixed his thumb print to the second will dated 18 November 1994 without understanding its true content and effect.

[25] The above testimony merely established that on the date when the second will was prepared the plaintiff was overseas. The latter, in the course of proving that the defendants had unduly influenced the testator (on allegation now withdrawn) during the relevant period, had adduced nothing concrete to support his allegation except offering mere opinion, conjectures and unsubstantiated remarks.

[26] Apart from the plaintiff's interpretation of the making of the will when he was overseas, 'suspicious circumstances' surrounding the making of the second will were alluded to, if they were indeed suspicious. They were in the like of the supposed statement of the first defendant that she had changed the testator's will, the second one being executed when he was overseas, and it being made so soon after the first will. What jarred the plaintiff further was the deprivation of his share of the impugned property and the executorship of the second will despite being loved by his late father. It must be stressed that any 'suspicious circumstances' to be proffered as evidence in the context of wills, must relate to circumstances surrounding the making of the will, not circumstances surrounding the testamentary capacity of the testator or matters which are too unrelated (see *Tho Yow Pew & Anor v Chua Kooi Hean* [2002] 4 MLJ 97).

[27] Having scrutinized the above 'suspicious circumstances' I must conclude that unless there were supporting evidence to say otherwise, they can only remain 'suspicious' and nothing more. Here there was none. The fact that he got nothing from the will, or the executorship was taken away from him, is not ample ground to set aside the will as fairness of the contents of the will is the prerogative of the testator, and to whom he wished to bequeath his property was his privilege.

[28] According to the plaintiff, the fact that DW2 had no way of knowing whether the instruction on the will was fully and accurately given to him, through the interpretation of the executor Tia Seng Lay as the latter and the testator spoke *Hock Chiew*, had made the second will suspect. The fact that the executor was one of the beneficiaries did not help the cause of the defendants either. I must at the outset state that even though the testator had relayed his wishes through an intermediary, that course of action did not contravene any known law. What is necessary is that the judge, in this case myself, must before making any presumption or finding in favour of the validity of the impugned will, ought to be strictly satisfied that there is no ground for suspicion, with the instruction given to the intermediary being unambiguous, clearly understood, correctly reported by that intermediary to the solicitor and necessarily rightly appreciated by that recipient solicitor (*Barton Singh v Amirchand* (1948) AC 161; *Porker v Felgate* (1883) 8 PD 171).

[29] Having perused the evidence I was satisfied that DW2 (the solicitor of the testator) had taken extra care and attention, as there was a drastic change in the contents of the second will *vis-a-vis* the first one, let alone that there was language difficulty with the testator. This witness after receiving instruction from the executor, as his firm was close to the shop of the testator, had personally gone to see him and thereafter obtained his confirmation. Again the confirmation was obtained with the assistance of the third defendant. Regardless of the fact that DW2 was not conversant with Hock Chiew, there was not a shred of evidence to show that the intermediary had not translated the desires of the testator faithfully, and the solicitor had failed to appreciate those instructions. Mere allegation of suspicion, in contrast to the other overwhelming sustaining evidence that supports the validity of the second will, certainly is not sufficient to tilt the balance.

[30] Even if the third defendant (the executor) had misled DW2, it must be borne in mind that the solicitor had had that instruction reconfirmed subsequently, when in the process of obtaining the right thumbprint of the deceased testator. This time the executor was not around and the interpretation was done by an uninterested person ie DW1. From the evidence it was crystal clear that the testimony of the latter coincided exactly with the interpretation of the executor. Interestingly enough, during the cross-examination of DW2 the latter had testified that even though he did not speak *Hock Chiew*, the testator on the other hand understood *Hokkien*. There were conversations between them in that dialect and the testator had confirmed the instructions as being full and accurate.

[31] Finally, I had moved on to the stage of the totality of the evidence before me, and after sieving through every bit of relevant evidence, I was unable to conclude that the testator had no testamentary capacity at the time of affixing his thumbprint on the second will. On that premise, as the only conclusion I could arrive at was that the validity of the will had remained intact, it thus must naturally follow that the probate was not tainted and thus valid. If the plaintiffs had miserably failed to rebut the regularity of the will after the defendants had successfully proven its legality, how could the plaintiff be said to have successfully proven his case on a balance of probabilities?

[32] On those grounds, I had not hesitated in dismissing the plaintiff's case with costs.

Claim dismissed.

Reported by Vinod Kamalanathan